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No. 88-1897 (1b)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

MICHIGAN DEPARTMENT OF STATE POLICE and COL. R. T. DAVIS, Director of the Michigan Department of State Police,

Petitioners,

v.

RICK SITZ, JOSEPH F. YOUNG, SR., DOMINIC J. JACOBETTI, DICK ALLEN, KEITH MUXLOW and JACK WELBORN,

Respondents.

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Where the Michigan courts concluded that the proposed Michigan sobriety checkpoint program addresses an issue of legitimate public concern, that it would have some effectiveness, and that objectively it would be only minimally intrusive, is the checkpoint program facially unconstitutional in violation of U.S. Const Amend IV merely because the Michigan courts also found that it would not be as effective as other law enforcement methods and that it would have a potential for generating subjective surprise and fear in some motorists?

LIST OF PARTIES

The parties to the proceedings in the Michigan courts were the same as in this court except that Petitioner Col. R. T. Davis, Director of the Michigan Department of State Police has been automatically substituted pursuant to Supreme Court Rule 40.3 for his predecessor in office, Gerald L. Hough, the former Director.

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OPINIONS BELOW

The opinion of the Wayne County Circuit Court is not officially reported. A copy of the opinion and order is reproduced in the App. to Pet. for Cert. 26a.

The opinion of the Michigan Court of Appeals is reported as Sitz v Department of State Police, 170 Mich App 433, 429 NW2d 180 (1988). A copy of the opinion is reproduced in the App. to Pet. for Cert. 2a.

The per curiam order of the Michigan Supreme Court denying leave to appeal is not officially reported. A copy of the order is reproduced in the App. to Pet. for Cert. 1a.

JURISDICTION

The trial court's opinion and order were entered June 24, 1986. The Michigan Court of Appeals opinion was entered August 1, 1988. A timely application for leave to appeal was filed in the Michigan Supreme Court and was denied in an order entered February 22, 1989. This Court's jurisdiction is invoked pursuant to 28 USC § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const, Amend IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

MCL 257.715:

"(1) Equipment on motor vehicles as required under this act shall be maintained as provided in this act. A uniformed police officer may on reasonable grounds shown stop a motor vehicle to inspect the vehicle, and if any defects in equipment are found, issue an appropriate citation under section 728 or 742 to the driver and order the driver to have the defect or defects repaired immediately. In case of an accident a police officer may make an inspection of the vehicles involved in the accident.

"(2) The director of the department of state police shall cause inspection to be made of motor vehicles operating on the public highways to detect defective equipment or other violations of law governing the use of public highways by motor vehicles, operators, and chauffeurs. For that purpose the director may establish temporary vehicle check lanes at appropriate locations throughout the state for checking for inadequacies and violations. A county, city, village, or township police department also may operate a temporary check lane within its limits with the express authorization of the director of the department of state police and under the direct supervision of a designated representative of the director."

Michigan State Police Sobriety Checkpoint Guidelines:

The text of the Guidelines is reproduced in the App. to Pet. for Cert. 132a.

STATEMENT OF THE CASE

The Michigan Drunk Driving Task Force was created by temporary legislation (MCL 257.625j, which expired on September 30, 1985) and was charged with the responsibility of reviewing and making recommendations relative to all aspects of the drunk driving problem in Michigan. In its final report (J. App. 19a-37a) the Task Force made 35 recommendations for combatting alcohol-related traffic accidents, most of which involved broad policy recommendations, public education proposals and suggestions for legislation. One specific recommendation was the implementation of sobriety check lanes. J. App. 35a-36a:

> "PROBLEM 32: Efforts to impact the 'had been drinking' driver involvement in Michigan accidents have centered around the traditional approaches of public information and education, and increased enforcement. While arrests and accidents are increasing, the involvement of the

'had been drinking' driver in fatal accidents has also continued to increase as a percentage of the total. It is imperative that we try new techniques to deter people from irresponsible drinking and driving.

"RECOMMENDATION 32: The Task Force recommends that in concert with the 1983 Report of the Presidential Commission Against Drunk Driving, the National Transportation Safety Board, and the National Commission on Drunk Driving, the use of temporary sobriety checklanes be used on a trial basis. It is recommended that these checklanes be operated within the definitions, goals, objectives and general policies developed by the Task Force."

In his January, 1986, State of the State address, Michigan Governor James J. Blanchard instructed the Department of State Police to initiate a sobriety checkpoint pilot program. This directive was supported by the Office of Highway Safety Planning. In response to Governor Blanchard's directive, Colonel Gerald Hough, then-Director of the Department of

State Police, set up an advisory committee to develop guidelines for the implementation of the sobriety checkpoint pilot program pursuant to the statutory authority of MCL 257.715. The committee, which included representatives from the Petitioner Department of State Police, county sheriffs' departments, county prosecutors' offices, and the University of Michigan Transportation Research Institute, studied the sobriety checkpoint programs of other states and the state case law which had developed since this innovative police procedure was first implemented.

Maryland, for example, had implemented a pilot sobriety checkpoint program in December, 1982, during National Drinking and Driving Awareness

Week. Lieutenant Raymond Cotton of the Maryland State Police testified at the hearing in this case that a survey of motorists conducted during this program found that 97% felt they were not significantly delayed in their journey, 90% believed such checkpoints increased a drunk driver's chance of being detected and arrested, over 90% believed that such checkpoints will deter people from driving while intoxicated, and 87% approved of using such checkpoints. Hearing Transcript, Vol. II, pp 18-22. Based on an evaluation of the feasibility and effectiveness of the checkpoint pilot program, Maryland decided to expand and continue the program. Hearing Transcript, Vol. II, pp 22-24. The Michigan advisory committee studied the Maryland program, among others, in

designing guidelines for the Michigan program.- Hearing Transcript, Vol. I, pp 84-86; Vol. III, pp 29, 68-69 (Testimony of Michigan State Police Director Gerald Hough, Inspector Leroy Fladseth and Lieutenant William Slaughter).

Inspector Fladseth, Chairman of the Michigan committee, testified that they also studied many judicial decisions involving checkpoints, particularly State v Deskins, 234 Kan 529, 673 P2d 1174 (1983), where the Kansas Supreme Court listed thirteen factors to be considered in evaluating the constitutionality of sobriety checkpoints. The Michigan committee attempted to incorporate such considerations in the Michigan Guidelines. Hearing Transcript, Vol. III, pp 12-30.

The Michigan Sobriety Checkpoint Guidelines are printed in full at App. to Pet. for Cert., 133a-164a. The goals and objectives of the program are as follows, App. to Pet. for Cert. 146a:

> "IV. GOALS
>
> "--Deter drunk driving, thereby reducing the death, injury, and property damage caused by alcohol- and drug-related traffic accidents.
>
> "--Conduct checkpoints with a minimal amount of intrusion or motorist inconvenience.
>
> "--Assure the safety of the general public as well as law enforcement officers involved.
>
> "V. OBJECTIVES
>
> "--Increase the perception of 'risk of apprehension' in the minds of those drivers who would operate a vehicle while under the influence of alcohol or controlled substances.
>
> "--Ensure that the constitutionally guaranteed rights of individuals are protected.
>
> "--Remove intoxicated drivers from the public highways."

Under the directives set forth in the Guidelines, each checkpoint operation will be selected by the Michigan Accident Location Index (MALI) computer. The MALI system specifically pinpoints every accident based upon intersecting roadways. It considers the driver, day of the week, the time, the weather, and any circumstances involving drinking. This system identifies those counties which have a significant alcohol-related accident problem and determines which sections of roadway within the county have the greatest problem. Once the roadways within a county are identified, Petitioner Department of State Police must review the sites to determine whether they comply with the safety and convenience criteria set forth in the Guidelines, App. to Pet. for Cert. 149a.

Each sobriety checkpoint is to be publicized through the use of local media prior to the checkpoint operation so as to enhance the deterrent effect among potential drunk drivers. Although the exact time and location of the sobriety checkpoints will not be made public in advance, their use is expected to receive wide publicity. An actual checkpoint operation is expected to last approximately two to four hours, depending upon the MALI-identified drunk driving period and the activity experienced.

The sobriety checkpoint is set up by placing reflectorized signs announcing in sequential order: "Sobriety Checkpoint Ahead," "Reduce Speed," "One Lane Road Ahead," and "Be Prepared to Stop." These signs are to be set in front of the

checkpoint and separated by intervals of 250 to 500 feet. After the third sign, a series of orange cones will be set up to funnel traffic into one lane so that the drivers arrive at the contact point in a single line of cars. Lighted fusees will be placed between the orange cones for additional illumination of the checkpoint lane. The area where the contact officers are located shall be totally illuminated by portable lighting equipment during evening operations. In addition, contact officers shall use reflectorized vests to increase their visibility. The opposite lane of traffic will not be checked; however, it will be slowed and funneled into one lane as an additional safety measure.

Then-Director Hough testified that an additional criteria not set forth in the

Guidelines is that the site selected must afford the driver the opportunity to make a legal and safe U-turn. Trial Transcript, Vol. I, pp 98-103.

The essential aspects of the checkpoint operation are described in the Guidelines as follows, App. to Pet. for Cert. 161a-163a:

"Officers will be assembled in the roadway to check motorists for articulable signs of intoxication. These officers will wear department-issued reflectorized vests and utilize orange cones attached to their flashlights for traffic direction and control.

"All traffic entering the checkpoint will be stopped. A uniformed police officer will approach the motorist and state, 'I am Trooper (Officer) _____ of the Michigan State Police (local police department). You have entered a sobriety checkpoint set up to identify intoxicated drivers.' If there is no immediate evidence of intoxication, a traffic safety informational brochure and survey card will be given to the motorist.

"During the brief stop, the officer will look for articulable signs of intoxication such as an odor of alcohol about the driver, slurred speech, and other behavior normally associated with OUIL or OUID violators. If the officer observes symptoms of intoxication, the driver will be directed to a predetermined 'safe area' for further investigation. If the situation warrants, the driver will be asked to submit to a preliminary breath test; and if sufficient evidence of intoxication is observed, the driver will be arrested."

The only sobriety checkpoint operation conducted by Petitioner Department of State Police occurred on May 17, 1986, and was operated according to the Guidelines. As described in the testimony of Colonel Hough, Inspector Fladseth and Lieutenant Slaughter (Hearing Transcript, Vol. I, pp 103-108; Vol. III, pp 3-118), it was a successful operation. Despite the fact that it was closed down after less than one hour of operation due

to inclement weather, the checkpoint was able to accommodate 126 vehicles with an average time of delay to the motorists of 30 seconds or less. Six drivers made U-turns and two others turned off to avoid the checkpoint. Acceptance by the people going through the checkpoint was favorable as evidenced by the fact that none of the drivers appeared ill at ease and everyone cooperated with the officers. The checking of these 126 drivers resulted in the detaining of two drivers for sobriety field tests and the arrest of one driver for driving while under the influence of alcohol. Another driver ran through the sobriety checkpoint and was subsequently stopped by the officer in the observation vehicle and arrested for driving while under the influence of alcohol. There were no accidents,

injuries, or altercations reported. This operation resulted in extensive media coverage as expected and encouraged by the law enforcement agencies involved.

Respondents filed a Complaint in the Wayne County Circuit Court on May 16, 1986, alleging that the sobriety checkpoint procedures on their face violated both the United States Constitution and the Michigan Constitution. Respondents sought declaratory judgment and a preliminary injunction against the use of sobriety checkpoints. Petitioners stipulated that no further sobriety checkpoints would be conducted pending the outcome of the litigation.

The trial court held an evidentiary hearing and then issued an opinion and order (App. to Pet. for Cert. 26a)

holding the checkpoint procedure unconstitutional. The Michigan Court of Appeals said that the trial court's findings were not clearly erroneous and affirmed (App. to Pet. for Cert. 2a) and the Michigan Supreme Court denied leave to appeal (App. to Pet. for Cert. 1a). The state courts applied a balancing test pursuant to Brown v Texas, 443 US 47 (1979), and purported to weigh the gravity of the public concerns served by the checkpoints, the degree to which they advanced the public interest, and the severity of their interference with individual liberty. The trial court concluded that there was a grave and legitimate public interest in curbing drunk driving (App. to Pet. for Cert. 72a-74a); that the checkpoints resulted in the apprehension of some drunk drivers

and that the evidence showed a short-term deterrent effect (App. to Pet. for Cert. 79a-83a, 92a); and that objectively the intrusion on individual liberties caused by the checkpoints was minimal and that the procedures minimized on-the-scene discretion (App. to Pet. for Cert. 104a, 113a).

Despite these conclusions, the trial court declared the sobriety checkpoint procedures facially unconstitutional because it found that the procedures would have "only a minimal degree of effectiveness" since there was no showing of long-term deterrent effect and since the State did not "demonstrate that checkpoints are the only practical alternative" to advance its interests. (App. to Pet. for Cert. 123a, 102a, 97a (emphasis in original)).

The trial court also declared the checkpoint procedures facially unconstitutional because it found that the procedures "have the potential for generating significant degrees of surprise and fear in motorists", that they have a "potential for abuse", and they have "a significant potential for intruding on traditionally protected liberty and privacy interests ... ." App. to Pet. for Cert. 118a, 117a.

SUMMARY OF ARGUMENT

Drunk driving is one of the nation's most serious public health and safety issues, resulting in tens of thousands of deaths and injuries each year, as well as hundreds of millions of dollars of economic harm. In an effort to address this serious social problem by apprehending drunk drivers and deterring motorists from drinking and driving, Michigan and many other states have sought to implement automobile checkpoints which require temporary stops of all vehicles. The Michigan sobriety checkpoint program was developed after careful study of programs in other states and of court decisions concerning their validity. Painstaking efforts were made to develop a pilot program which would be based on objective

neutral criteria in order to limit potential abuses of discretion and which would be minimally intrusive while still preserving its effectiveness. Despite these efforts, a Michigan state court declared the program to be facially unconstitutional, in violation of motorists' Fourth Amendment rights.

The fundamental Fourth Amendment principle is that a seizure like that in a traffic checkpoint be "reasonable". This requires balancing the motorists' right to be free from arbitrary interference by law officers against the checkpoint's promotion of legitimate governmental interests. This Court has recognized that different traffic-checking procedures involve different balances of public and private interests

and thus may be subject to different constitutional safeguards. In Almeida-Sanchez v United States, 413 US 266 (1973) and United States v Ortiz, 422 US 891 (1975), the Court held that searches of automobiles, whether by roving police patrols or at checkpoints, must be based on probable cause. In United States v Brignoni-Ponce, 422 US 873 (1975) and Delaware v Prouse, 440 US 648 (1979), the Court held that seizure of automobiles for further inquiry by roving police patrols requires reasonable suspicion based on articulable facts. In United States v Martinez-Fuerte, 428 US 543 (1976), however, the Court held that a vehicle may be stopped for further questioning without any suspicion of wrongdoing at a permanent traffic checkpoint because checkpoint stops are

substantially less intrusive than roving patrol stops. Petitioners submit that the proposed Michigan sobriety checkpoints are constitutionally indistinguishable from the checkpoint in Martinez-Fuerte and are not as intrusive as the roving police patrols in Brignoni-Ponce and Prouse.

The undisputed evidence in this case shows that the social problem of drunk driving is severe; that the Michigan sobriety checkpoints will in fact result in the apprehension of drunk drivers in approximately 1% of the vehicles passing through the checkpoint; that the checkpoints will have a short-term deterrent effect on drunk driving; that the procedures used in the checkpoints minimize on-the-scene discretion by law enforce-

ment officers; and that the checkpoints objectively are only minimally intrusive. Petitioners submit that under the appropriate balancing of public and private interests, the Michigan sobriety checkpoint program is facially constitutional.

The state court's conclusion to the contrary is based upon a distortion of the appropriate balancing test and upon speculation and findings of fact which are not supported by the record. The state court erroneously required Petitioners to prove, in advance and with empirical data, that the checkpoints would generate an unspecified higher arrest rate, that they would have long-term deterrent effect, and that they are the only practical alternative available

to combat the drunk driving problem. The state court also concluded, without any basis in the record, that the checkpoints had a potential for abuse and a potential for generating fear or surprise in some motorists. In this facial constitutional challenge, the state court clearly misapplied the appropriate balancing test and made erroneous factual findings.

Where, as here, the seriousness of the social problem is great, the intrusion is minimal and there is reasonable effectiveness in the law enforcement practice, the Michigan sobriety checkpoint program should be declared facially constitutional.

ARGUMENT

THE MICHIGAN SOBRIETY CHECKPOINT PROGRAM IS CONSTITUTIONAL ON ITS FACE.

General Constitutional Principles.

This is a facial challenge to the constitutionality of the Michigan sobriety checkpoint program. Complaint, ¶¶ 27, 31 (J. App. 8a, 9a). The six named individual plaintiffs had never been subjected to a sobriety checkpoint. They brought this action for injunctive and declaratory relief on the basis of the Guidelines describing the proposed program (App. to Pet. for Cert. 133a-164a) before any sobriety checkpoint had been operated in Michigan. Because this is a facial constitutional challenge, the question is whether the sobriety checkpoints as contemplated in the Guidelines

"can ever be conducted." Skinner v Railway Labor Executives Assn, 489 US __; 103 L Ed 2d 639, 670, fn 10 (1989) (emphasis in original). C.f. Bell v Wolfish, 441 US 520, 560 (1979). If this Court upholds the facial constitutionality of the Michigan checkpoint program, it of course remains true that any individual subjected to a checkpoint is free to challenge the constitutionality of that checkpoint as applied to him or her. See United States v Martinez-Fuerte, 428 US 543, 559 (1976) ("Moreover, a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review." (footnote omitted)).

It is undisputed that the limited stops of automobiles at the Michigan

traffic sobriety checkpoints constitute "seizures" implicating Fourth Amendment rights. United States v Martinez-Fuerte, supra, 428 US at 556. See also Brower v County of Inyo, 489 US ___; 103 L Ed 2d 628, 635 (1989) (a Fourth Amendment seizure occurs "only when there is a governmental termination of freedom of movement through means intentionally applied" (emphasis in original)). Recognition that the Fourth Amendment applies is merely the first step of the analysis, however, as this Court recently summarized in Skinner v Railway Labor Executives Assn, supra, 103 L Ed 2d at 660-661:

> "To hold that the Fourth Amendment is applicable ... is only to begin the inquiry into the standards governing such intrusions. *** For the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. *** What is reasonable, of course, 'depends on

all the circumstances surrounding the search or seizure and the nature of the search or seizure itself.' *** Thus, the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." ***

"In most criminal cases we strike this balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment. *** We have recognized exceptions to this rule, however, 'when "special needs beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable"' *** When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in the particular context."

The opinion in Railway Labor Executives goes on to list several of the contexts in which a different standard was applied, 103 L Ed 2d at 661, and several other cases contain more extensive lists of examples, see, e.g., Texas

v Brown, 460 US 730, 735-736 (1983) (plurality opinion). It would serve no useful purpose to attempt an exhaustive list of such exceptions here, but it should be noted that such cases have been summarized as involving circumstances which make the warrant and probable cause requirement impracticable because of "a special law enforcement need for greater flexibility." In such circumstances, it is appropriate to balance the governmental and private interests to determine whether "the public interest is best served by a lesser standard." New Jersey v T. L. O., 469 US 325, 351 (1985) (Blackmun, J., concurring).

One exception to the Warrant Clause which is "clearly justified", Texas v Brown, supra, 460 US at 745, n 1 (Powell,

J., concurring), is the automobile exception. Automobiles have traditionally been treated differently than homes for Fourth Amendment purposes, because of the inherent mobility of automobiles and because "the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." South Dakota v Opperman, 428 US 364, 367 (1976) (footnote omitted). In Opperman, this Court noted that the expectation of privacy with respect to automobiles "is further diminished by the obviously public nature of automobile travel". It also observed that automobiles are subjected to "pervasive and continuing governmental regulation and controls" and that as part of their responsibility for ensuring public safety, law enforcement

officials are frequently brought into circumstances where they stop and examine vehicles "as an everyday occurrence". 428 US at 368.

Fourth Amendment Principles in Traffic-Checking Cases.

"It is settled, of course, that a stop and search of a moving automobile can be made without a warrant." Almeida-Sanchez v United States, supra, 413 US at 269, citing Carroll v United States, 267 US 132 (1925). In Almeida-Sanchez the Court held that roving Border Patrol searches of vehicles require probable cause. In United States v Ortiz, 422 US 891 (1975), the Court followed Almeida-Sanchez and held that even at routine traffic checkpoints where it was permissible to stop all oncoming

vehicles, officers may not search private vehicles without consent or probable cause. 422 US at 896-897. The Court was careful to note, however, that not every aspect of a routine automobile inspection (which might include examination of the trunk, under the hood, beneath the chassis and behind seat cushions) necessarily constitutes a search for purposes of the Fourth Amendment. 422 US at 897, fn 3. The Court also indicated that a different standard might apply if the vehicle inspection was for a purpose other than discovering illegal aliens, 422 US at 897, fn 3:

> "Nor do we suggest that probable cause would be required for all inspections of private motor vehicles. It is quite possible, for example, that different considerations would apply to routine safety inspections required as a condition of road use."

In Almeida-Sanchez and Ortiz, the Court dealt with intrusive searches, but in United States v Brignoni-Ponce, 422 US 873 (1975), the Court dealt with the Fourth Amendment standard to be applied in seizures of automobiles made by roving patrols for the purpose of a brief inquiry in order to question the occupants about their citizenship and immigration status. The Court observed that the reasonableness of such seizures "depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." 422 US at 878. The Court recognized the "valid public interest" which "demands effective measures to prevent the illegal entry of aliens", 422 US at 879, 878, and said:

> "Because of the limited nature of the intrusion, stops of this sort may be

> justified on facts that do not amount to the probable cause required for an arrest." 422 US at 880.

The Court enunciated the following standard, 422 US at 884:

> " ... officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion 'that the vehicles contain aliens who may be illegally in the country." (footnote omitted).

The Court also observed that each case must turn on the totality of its own particular circumstances, 422 US at 885, fn 10, and therefore observed that other considerations might apply in other contexts, 422 US at 883, fn 8:

> "Our decision thus does not imply that state and local law enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters."

In Delaware v Prouse, 440 US 648 (1979), the Court dealt with a situation similar to that in Brignoni-Ponce, although not involving the Border Patrol. The question in Prouse was whether police officers could make a totally random stop of an automobile being driven on a public highway for the purpose of checking the driver's license of the operator and the registration of the car, where there was no suspicion of any wrongdoing. The Court recognized the states' "vital interest" in vehicle licensing registration and inspection requirements, but noted that random stops to check documents involved significant "physical and psychological intrusion" upon the motorist and that random, discretionary spot checks were not "a sufficiently productive mechanism to justify the intrusion". 440 US at 658, 657, 659.

Two aspects emerge from the Court's opinion with great clarity. First, the significant nature of the intrusion caused by a random stop--as opposed to a checkpoint--was said to be "crucial." 440 US at 656. Second, the state urged that its police officers be subject to no constraints at all in deciding which cars to stop, and this Court concluded that without either particularized suspicion or "some other substantial and objective standard or rule to govern the exercise of discretion" such seizures posed a "grave danger of abuse of discretion by the official in the field which should be circumscribed." 440 US at 661-662.

Because of the extent of the intrusion and the danger of abuse of discretion, the Court in Prouse adopted a

standard of "articulable and reasonable suspicion" before a roving police patrol was permitted to stop an automobile and detain the driver in order to check his driver's license and automobile registration. 440 US at 663. Again, however, just as in Ortiz, supra, and Brignoni-Ponce, supra, the Court was careful to indicate that its holding was not necessarily applicable in other contexts, 440 US at 663:

> "This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion.[26] Questioning of all oncoming traffic at road block-type stops is one possible alternative. We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers.

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[26]"Nor does our holding today cast doubt on the permissibility of road-

> side truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others."

In Almeida-Sanchez and Ortiz, the Court held that searches of automobiles, whether by roving patrols or at permanent checkpoints, must be justified by probable cause. In Brignoni-Ponce and Prouse, the Court held that seizures of automobiles for brief inquiry by roving patrols requires the lesser standard of articulable facts and reasonable suspicion. Different traffic-checking practices involve different balances of public and private interests and thus may be subject to different and less stringent constitutional safeguards. United States v Martinez-Fuerte, 428 US 543, 555 (1976).

In Martinez-Fuerte the Court dealt with yet another factual context--one which Petitioners submit is constitutionally indistinguishable from the facts of the instant case--and held that at a permanent traffic checkpoint a vehicle may be stopped for brief questioning of its occupants even without any suspicion of wrongdoing. The Court concluded that the purpose of the stops is legitimate and in the public interest; that the need for this enforcement technique had been demonstrated; and that the reasonableness of the procedures used in the checkpoints minimized the intrusion on the interests of motorists and minimized discretionary enforcement activity.

The most important aspect of the checkpoint seizures in Martinez-Fuerte

which distinguished them from the roving patrol seizures in Brignoni-Ponce was the fact that in checkpoint seizures, "the subjective intrusion--the generating of concern or even fright on the part of lawful travelers--is appreciably less" than in roving patrol stops. 428 US at 558. Three terms later, in Delaware v Prouse, supra, 440 US at 656, the Court characterized this distinction as "crucial". Furthermore, the Court in Martinez-Fuerte concluded that because of the "regularized manner" in which the checkpoints were operated, and because of their "public and relatively routine nature", their potential interference with legitimate traffic and their potential room for abusive or harassing stops was minimal. 428 US at 558-560.

Although the Court refrained from an expansive ruling applicable to factual circumstances not before it, it observed that similar types of traffic-checking stops are common, 428 US at 560, fn 14:

> "Stops for questioning, not dissimilar from those involved here, are used widely at state and local levels to enforce laws regarding drivers' licenses, safety requirements, weight limits, and similar matters. The fact that the purpose of such laws is said to be administrative is of limited relevance in weighing their intrusiveness on one's right to travel; and the logic of the defendant's position, if realistically pursued, might prevent enforcement officials from stopping motorists for questioning on these matters in the absence of reasonable suspicion that a law was being violated. As such laws are not before us, we intimate no view respecting them other than to note that this practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use."

Application of Principles to Michigan Sobriety Checkpoint Procedure.

The Michigan sobriety checkpoint program serves the law enforcement goal of apprehending drunk drivers and, in addition, also serves other "special needs" such as promoting highway safety in specific locations having a history of alcohol-related accidents, deterring drunk driving and educating the public by increasing the awareness of the drunk driving problem. In these circumstances there is no doubt that a balancing test is appropriate to determine the Fourth Amendment standard applicable to sobriety checkpoint seizures. In the instant case the state court purported to apply a balancing test as enunciated in Brown v Texas, 443 US 47, 50-51 (1979). Brown is not a traffic-checking case and, indeed,

does not involve automobiles at all. Rather, it involved a state statute making it a crime for a person to refuse to identify himself to a police officer who has lawfully stopped the person. In holding the state statute unconstitutional the Court discussed, inter alia, several of the automobile traffic-checking cases and concluded, 443 US at 50-51:

> "The reasonableness of seizures that are less intrusive than a traditional arrest *** depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' *** Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. ***
>
> "A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expec-

> tation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. *** To this end, the Fourth Amendment requires that a seizure must be based on specific objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." 443 US at 51.

Neither the state court nor the Respondents appear to dispute that the Guidelines under which the Michigan sobriety checkpoint procedure is to be operated constitute "explicit, neutral limitations on the conduct of individual officers" in effectuating seizures of automobiles. Brown, supra, 443 US at 51. Indeed, the state court concluded that the Guidelines "will ensure that on-the-scene officers' discretion relative to the operation of sobriety checkpoints

will be minimal." App. to Pet. for Cert. 113a. Instead of focusing on the importance of the public concern, the objectively minimal intrusion and the strict limits on discretion, the state court erroneously applied a heightened--but unspecified--test for showing effectiveness and relied upon a wholly theoretical basis--without any support in the record--for finding "potential" constitutional infirmity.

The Gravity of the Public Concern

The gravity of the public concern which is at issue in the instant case is undisputed. This Court has made reference to it in South Dakota v Neville, 459 US 553, 558 (1983), in the course of holding that the admission into evidence of refusal to take a blood-

alcohol test did not violate constitutional rights:

> "The situation underlying this case--that of the drunk driver--occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here."

In Railway Labor Executives Association, supra, 103 L Ed 2d 639, this Court approved a program of breath, urine and blood testing for drugs and alcohol which constituted searches far more intrusive than the limited seizures at issue in this case. Individualized suspicion was not required because the "important government interest furthered by the intrusion" outweighed the "minimal" privacy interest at stake, particularly in an area which is "regulated pervasively to ensure safety." 103 L Ed 2d at 666.

> "This governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty. This interest also 'require[s] and justif[ies] the exercise of supervision to assure that the restrictions are in fact observed.'" 103 L Ed 2d at 662. (Citation omitted).

In Railway Labor Executives Association, supra, the testing program was based in large part on the fact that in the eleven-year period from 1972 to 1983 nationwide statistics showed there were at least 21 significant train accidents involving drug or alcohol use which resulted in 25 fatalities, 61 non-fatal injuries and property damage of $19 million, 103 L Ed 2d at 653. In the instant case, by comparison, the advisory committee which developed the Guidelines for the Michigan sobriety checkpoint

program cited the following statistics, App. to Pet. for Cert. 140a:

> "Michigan 1984 alcohol-related traffic crash statistics reveal that 800 persons died, 28,681 suffered personal injury, with a total economic cost of $351,959,000."

Degree To Which Seizure Advances Public Interest

Undisputed evidence in the instant case demonstrated that the Michigan sobriety checkpoints did in fact result in apprehending drunk drivers (2 arrests out of 127 vehicles) and that such checkpoints have short-term deterrent effect. Respondents' expert witness Dr. H. Laurence Ross claimed to be familiar with every major published study involving governmental efforts to control drunk driving (J. App. 41a), and although he knew of no conclusive studies

demonstrating long-term deterrent effects of sobriety checkpoints (J. App. 56a), his own scholarly writings indicated that the evidence regarding such checkpoints is encouraging and that the potential for this enforcement technique should be considered a high priority matter for policy analysis (J. App. 67a, 69a). More importantly, Dr. Ross testified that sobriety checkpoints do in fact have short-term deterrent effect (J. App. 64a-65a):

> "Q. Would it be true, sobriety check lanes or checkpoints for the short time have shown to have some positive effect as far as deterrent?
>
> "A. That is correct.
>
> " ***
>
> "Q. I see. You do say there is evidence of a deterrent effect on the short-term than as to lives saved?
>
> "Yes."

The state court acknowledged that the evidence showed "a minimal degree of

effectiveness", but declared the sobriety checkpoint program facially unconstitutional because it would not result in enough arrests, because no long-term deterrent effect had been proven, and because other law enforcement procedures were available. App. to Pet. for Cert. 123a. Petitioners submit that this conclusion is clearly erroneous on the basis of the record and is incorrect as a matter of law since it distorts the appropriate test for evaluating the reasonableness of the procedure.

As shown by the single checkpoint procedure which was implemented in Michigan (2 arrests out of 127 vehicles), as well as by the statistics in other reported cases, traffic sobriety checkpoints result in the apprehension of per-

sons charged with drunk driving in approximately 1% of the vehicles which go through the checkpoints. App. to Pet. for Cert. 79a-83a. The state court found that this was not effective enough (Id., 83a), but the 1% success rate compares very favorably with the success rates in other search and seizure contexts which have been found constitutional.

For example, in National Treasury Employees Union v VonRaab, 489 US ____, 103 L Ed 2d 685 (1989), it was contended, among other things, that a drug testing program was unjustified and therefore unreasonable because no more than five employees out of 3,600 tested positive for drugs. The Court evaluated this contention in light of the safety and security hazards which the program

addressed and categorically rejected the challenge, 103 L Ed 2d at 708:

> "The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity. The same is likely to be true of householders who are required to submit to suspicionless housing code inspections, see Camara v Municipal Court, 382 US 523 (1967), and of motorists who are stopped at the checkpoints we approved in United States v Martinez-Fuerte, 428 US 543 (1976). *** Where, as here, the possible harm against which the government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the government's goal." (Footnote omitted).

In the footnote to the foregoing quotation, the Court analogized to the required search of all passengers seeking to board commercial airliners as well as the search of their carry-on luggage and observed, 103 L Ed 2d at 708, fn 3:

> "When the government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success."

In National Treasury Employees Union, supra, the positive drug testing rate was slightly more than one-tenth of one per cent. That is virtually the same as the percentage of vehicles found to contain deportable aliens at the checkpoint in Martinez-Fuerte, 428 US at 554 (171 out of 146,000 vehicles). The airport searches discussed in footnote 3 of National Treasury Employees Union found 42,000 firearms out of approximately 19.5 billion searches of persons and pieces of luggage for a success rate of approximately 0.0002%. Those statistics should be compared to the success rate of sobriety checkpoints which approximates 1%.

The success rate of apprehending drunk drivers must also be evaluated in light of the fact that the features of the program which reduce its effectiveness--such as advance publicity, limited hours of operation, and the opportunity to avoid the checkpoint entirely--are the same factors which reduce the intrusiveness of the seizure itself. The irony of this was noted in National Treasury Employees Union v VonRaab, supra, 103 L Ed 2d at 709, n 4.

Despite the undisputed evidence of the short-term deterrent effect of sobriety checkpoints (J. App. 64a-65a), the state court decision seems to be based on a unilateral-post-trial requirement that the State prove long-term deterrent effect. Petitioners submit

that such a requirement is without support in either logic or Fourth Amendment jurisprudence. The facial constitutionality of innovative law enforcement techniques does not depend upon an advance empirical demonstration of long-term deterrent effect. The state court's decision to the contrary is simply wrong.

The state court also incorrectly required Petitioners to demonstrate, by empirical proof, "that checkpoints are the only practical alternative." App. to Pet. for Cert. 97a, (footnote omitted, emphasis in original). To the extent that the state court evaluated the effectiveness of the sobriety checkpoint procedure in comparison to other police procedures, its decision clearly violates the principle that such less-restrictive-

alternative arguments are inapplicable in the search and seizure context. In United States v Martinez-Fuerte, 428 US at 556, fn 12, the Court specifically rejected such an argument:

> "The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search and seizure powers."

The inapplicability of this type of analysis was recently reaffirmed in Railway Labor Executives Association, supra, 103 L Ed 2d at 667, n 9, where the Court again rejected such an argument:

> "We have repeatedly stated, however, that '[t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative "less intrusive" means.' *** It is obvious that '[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers,' ... because judges engaged in post hoc

> evaluations of government conduct 'can almost always imagine some alternative means by which the objectives of the [Government] might have been accomplished.'"
> (Citations omitted).

It is undisputed that in order to be constitutional a law enforcement procedure must have some degree of effectiveness in advancing the public interest. For example, in Delaware v Prouse, supra, 440 US at 659, the Court concluded that the random roving patrol seizure was not "a sufficiently productive mechanism to justify the intrusion". Furthermore, depending upon the "totality of the particular circumstances", Brignoni-Ponce, 422 US at 885, fn 10, it may be appropriate, in evaluating effectiveness, to consider "practical alternatives". Brignoni-Ponce, 442 US at 881. The error in the decision of the

state court in the instant case, however, is that it imposed on the Petitioners the burden of proving--in advance and by empirical data--that sobriety checkpoints meet some unspecified level of long-term effectiveness and that such checkpoints will be the most effective of all possible alternative police procedures. In placing such an impossible burden on the state, the state court seems to have forgotten that the test enunciated in this Court's decisions is a balancing test. The relative strength or weakness of any one of the factors identified in Brown, supra, 443 US at 51, is not dispositive. The fundamental standard is "reasonableness" and "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment

interests against its promotion of legitimate governmental interests." Delaware v Prouse, supra, 440 US at 654.

This Court's decisions appear to apply a standard of "reasonableness" in evaluating the effectiveness of particular law enforcement practices. For example, in Prouse, supra, 440 US at 660, the Court invalidated the practice of random spot checks because they did not appear "sufficiently productive to qualify as a reasonable law enforcement practice ... ." In New York v Burger, 482 US 691, 709-710 (1987), the Court upheld warrantless searches of a pervasively regulated business, in part because frequent unannounced searches were necessary in order to be effective and serve as a credible deterrent. Given

the nature of the problem of automobile theft, the Court said that the state "rationally may believe" that warrantless searches will address the problem and that such a procedure "reasonably serves the State's substantial interest". Even if it is not possible to specify with precision the exact constitutional threshold of effectiveness a law enforcement procedure must meet or the exact relationship it must bear to other possible procedures, where, as here, the nature of the public interest is very substantial and the intrusiveness is minimal, the facial constitutionality of sobriety checkpoint seizures should be upheld without requiring the advance empirical showing of the heightened level of effectiveness mandated by the state court.

Regardless of what level of effectiveness is constitutionally required, Petitioners submit that the evidence in the instant case is sufficient to meet it. There is undisputed evidence of short-term deterrent effect and of a success rate of more than 1% in apprehending drunk drivers at sobriety checkpoints. This level of effectiveness is greater than that in Martinez-Fuerte, supra, 428 US 543.

In Martinez-Fuerte, this Court concluded that seizures at checkpoints for the purpose of brief inquiry are permissible even without any individualized suspicion. The Court concluded that "the need for this enforcement technique", 428 US at 562, was demonstrated in three respects: The government identified it

as an important practice; there was factual evidence indicating an apprehension rate of approximately 0.1%; and the Court found, without citation to any evidence in the record, that there was a deterrent effect inherent in the procedure. 428 US at 556-557. In the instant case the undisputed factual record shows that appropriate officials believe that sobriety checkpoints have the potential for significantly reducing the number of drunk drivers on the road, thus reducing the fatality rate, the injury rate, and the significant property damage caused by drinking and driving. Undisputed evidence further shows that in the one checkpoint which was in fact operated in Michigan for less than one hour, two drivers were apprehended for driving under the influence of alcohol. The effective

rate of apprehension for that limited operation is approximately ten times the rate which the Court identified in Martinez-Fuerte as resulting in a "high" number of apprehensions, 428 US at 562, fn 15, and as resulting in the apprehension of "many" violators. 428 US at 557. Undisputed testimony from Respondents' own expert witness demonstrated short-term deterrent effectiveness from the operation of sobriety checkpoints, although in his opinion it was unlikely that there would be long-term deterrent effects.

On this record, the showing of the "degree to which the seizure advances the public interest", Brown, supra, 443 US 51, is significantly greater than the showing in Martinez-Fuerte. This showing

must be evaluated in light of the fact that this is a facial constitutional challenge in which the question is "whether the tests contemplated by the regulations can ever be conducted". Railway Labor Executives Assn, supra, 103 L Ed 2d at 670, fn 10. C.f., Bell v Wolfish, 441 US 520, 560 (1979).

The Michigan court's conclusion that the sobriety checkpoint program fails the so-called "effectiveness" test is incorrect as a matter of law and is contrary to the factual record.

The Checkpoints Are Only Minimally Intrusive

The state court correctly concluded that the sobriety checkpoint procedures will result in only minimal objective intrusion and that the Guidelines ensure

that the discretion of officers on the scene is minimal. App. to Pet. for Cert. 104a, 113a. These conclusions are inescapable, given the undisputed nature of the procedure as described in the Guidelines contained in App. to Pet. for Cert. 133a-164a. The state court went on, however, to say that there was a potential that some motorists would experience fear or surprise and there was a potential for intruding on a traditionally protected liberty interest and therefore the state court held that the checkpoint procedure is facially unconstitutional. Petitioners submit that this conclusion is without factual support in the record, distorts the appropriate constitutional balancing test and is directly contrary to decisions of this Court stating that checkpoint stops,

like the stops contemplated by the Michigan procedure, are not subjectively intrusive.

This Court has had several occasions to evaluate the intrusiveness of various types of traffic stops. In United States v Ortiz, 422 US 891, 894-895 (1975), the Court observed that seizures at traffic checkpoints are "far less intrusive" than those at roving patrol stops:

> "At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officer's authority, and he is much less likely to be frightened or annoyed by the intrusion."

Similarly in United States v Martinez-Fuerte, supra, 428 US at 558-559, the Court reiterated that the subjective intrusion at checkpoint stops is "appreciably less" than the intrusion caused by roving patrols:

> "Routine checkpoint stops do not intrude similarly upon the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere. Second, checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops. Moreover, a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review." (Footnote omitted).

See also Delaware v Prouse, supra, 440 US at 657.

The state court said that because the Michigan sobriety checkpoints are movable from day to day, unlike the permanent fixed checkpoint in Martinez-Fuerte, the sobriety checkpoints had the potential to generate fear or surprise in some motorists. There is no evidence to support such a conclusion. There was no testimony to that effect from any of the individual Respondents or any other witness, and there is simply no factual basis for inferring such a subjective reaction. Furthermore, the factual differences between the Michigan sobriety checkpoints and the checkpoints in Martinez-Fuerte are not significant enough to justify different constitutional treatment.

The Court's opinions in both Ortiz, supra, 422 US at 893-894 and in

Martinez-Fuerte, supra, 428 US at 545-547, 554, describe the operation of the checkpoint. Although the checkpoint is not in operation approximately 30% of the time, Martinez-Fuerte, supra, 428 US at 554, when it is in operation, it functions in a manner which is virtually indistinguishable from the Michigan sobriety checkpoint procedures described in the Statement of Facts, supra, pp 6-11. The only difference between the sobriety checkpoints at issue in the instant case and the checkpoints at issue in Martinez-Fuerte is that Michigan's sobriety checkpoints are not operated at permanent locations and their exact locations are not publicized in advance. Unlike a roving patrol, however, while a sobriety checkpoint is in operation, its location is fixed, the duration of its

operation is limited to a few hours, the duration of each seizure is limited to a few seconds, and the potential for arbitrary exercise of discretion is minimized. The existence of checkpoints in a general area is publicized in advance and each checkpoint is operated in such a manner, by way of advance signs, lights, and fusees, for example, that its location cannot be deemed a surprise to a motorist. In sum, the operation of the Michigan sobriety checkpoints is, for constitutional purposes, identical to the checkpoints at issue in Martinez-Fuerte and is unlike the roving patrols at issue in Prouse.

In evaluating the subjective intrusion of the sobriety checkpoint procedure, the state court imposed an

additional factor and purported to evaluate the extent to which the proposed checkpoints are consistent with traditionally protected liberty and privacy interests. Using its own subjective perceptions of the implications of such a procedure, the court found a "potential for abuse" and declared that the proposed sobriety checkpoint program is "not consistent" with such interests. App. to Pet. for Cert. 113a-117a. This type of analysis is very similar to the less-restrictive-alternative approach which this Court has rejected in the search and seizure context, Railway Labor Executives Assn, supra, 103 L Ed 2d at 667, n 9, and is inconsistent with the test which this Court has consistently applied which requires "balancing its intrusion on the individual's Fourth Amendment interests

against its promotion of legitimate governmental interests", Prouse, supra, 440 US at 654. The state court declared the sobriety checkpoint program facially unconstitutional in part because it "goes beyond the traditionally recognized reasons for stopping motorists in their cars." App. to Pet. for Cert. 115a. This is an inadequate and improper basis for rendering a judgment of facial unconstitutionality.

CONCLUSION AND RELIEF SOUGHT

It is undisputed that the proposed Michigan sobriety checkpoint program addresses an extraordinarily grave public concern. It is undisputed that the program will be effective, both in apprehending drunk drivers and in having a short-term deterrent effect. It is undisputed that the procedures will minimize on-the-scene discretion by law enforcement officers and that the intrusion on Fourth Amendment interests of motorists will be objectively minimal. On these facts, the proposed program is not unconstitutional on its face, even assuming that there was no proof in advance of long-term deterrent effect and that some motorists might experience fear or surprise at the procedure.

The judgment of the Michigan courts should be reversed and this Court should declare the Michigan sobriety checkpoint program constitutional on its face.

Respectfully submitted,

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